IN THE

Supreme Court of the United States

No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE REPLY BRIEF AND REPLY BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE

MARK L. EVANS
ANTHONY A. LAPHAM
DONALD S. BURRIS
PHILIP J. HARTER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

EDWARD LEE ROGERS
162 Old Town Road
East Setauket, New York 11733

Attorneys for Amicus Curiae Environmental Defense Fund

SHEA & GARDNER

Of Counsel

Washington, D.C. THIEL PRESS 202 393-0625

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE REPLY BRIEF	1
REPLY BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE	1
THE INADEQUACY OF THE ADMINISTRATIVE RECORD	2
THE PARK PURPOSE ISSUE	3
THE SPECIAL USE PERMIT	9
CONCLUSION	12

TABLE OF CITATIONS

Cases:

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 2

Statutes:

Title 16, United States Code:

Section 1 . . . . . 3, 5
1c(b) 7
2 5
3 8
8c 5
20 . . . . . 7, 8
20a 7
20b 8
20e 8
45a 6
45b 7, 11
688 7

Miscellaneous:

Administrative Policies For Natural Areas Of The National Park System, Department of Interior, National Park Service (1970 ed.) 9

S. Rep. No. 765, 89th Cong., 1st Sess. (1965) 8

IN THE

Supreme Court of the United States

No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE REPLY BRIEF

The Environmental Defense Fund hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case.

The vital interest of the Environmental Defense Fund in the outcome of this case was explained in our principal brief. We then proceeded to argue in that brief that the Ninth Circuit erred in holding that the Sierra Club lacked standing and in holding, on this record, that the Secretary of Interior had acted within the scope of his statutory authority in approving the construction of a new access highway to Mineral King

through Sequoia National Park. The Sierra Club, in its principal brief, urged several additional reasons why the judgment of the Ninth Circuit should be reversed, and the government's brief deals with these additional points as well as the points that we briefed in common with the Sierra Club.

Ordinarily we would not consider it appropriate to burden the Court with a reply brief *amicus curiae*. In present circumstances, however, the extra burden is justified in our view by the chance that an independent reply from the Environmental Defense Fund might materially assist the Court in connection with the access highway issue—the only issue apart from standing that we addressed in our principal brief and the only one with which we deal in the attached reply brief. The need for further statement on this issue arises in part because of the new legal theories introduced by the government in defense of the highway approval action, which alter somewhat the arguments at which our principal brief was directed. More importantly, the government has introduced in this Court certain factual assertions—relating to the special use permit for the access highway that the Department of Interior proposes to grant to the State of California—that are not only new but that differ from the facts on the same subject as they stood when the case was before the Ninth Circuit. Quite simply, the special use permit attached as Appendix A to the government's brief in this Court is not the same as the permit attached to its brief in the Ninth Circuit. Nor does the government's brief in this Court make any mention of revision of the permit. In result, the argument in our own principal brief contains references to permit provisions that do not correspond to any provisions of the permit now before this Court. While we do not believe that any justification for the Secretary's highway approval action can be found in the revised permit—indeed we see in the revision another reason why the Secretary's action should not be sustained—nevertheless we believe that the Environmental Defense Fund is entitled to an opportunity to press these contentions in an independent reply brief.

WHEREFORE, it is requested that leave to file the attached reply brief *amicus curiae* be granted.

Respectfully submitted,

MARK L. EVANS
ANTHONY A. LAPHAM
DONALD S. BURRIS
PHILIP J. HARTER
734 Fifteenth St., N. W.
Washington, D. C. 20005

EDWARD LEE ROGERS
162 Old Town Road
East Setauket, N. Y. 11733

SHEA & GARDNER
Of Counsel

Attorneys for Amicus Curiae
Environmental Defense Fund

IN THE

Supreme Court of the United States

No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE

In our principal brief, we addressed ourselves to the issue of the Sierra Club's standing and the issue of the authority of the Secretary of Interior to permit construction of a highway through Sequoia National Park. It seems to us that the weakness of the government's arguments on the highway issue, to which we confine ourselves in this reply brief, demonstrates in a striking way that lawless administrative action, and an unauthorized use of public land, will result unless the standing issue is resolved in the Sierra Club's favor.

THE INADEQUACY OF THE ADMINISTRATIVE RECORD

Nowhere in its brief does the government assert that there exists in this case the essential condition for effective judicial review of agency action that is challenged as arbitrary and in excess of statutory authority—namely, a record consisting of all the materials that were before the Secretary when he made his decision plus whatever additional materials are necessary to disclose what considerations the Secretary deemed relevant, how he appraised the evidence, and how he construed his authority. *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 416, 420 (1971). Indeed, apart from certain ambiguous references to a proposed special use permit for construction of the highway, which it attaches to its brief as Appendix A but which apparently is not even part of the administrative record let alone an adequate record by itself, the government does not seek to identify any of the materials that were before the Secretary when he approved a Sequoia National Park routing for an access highway to the Mineral King development. Instead the government would have this Court proceed to judgment in its favor according to its own rules of review—that is, on the basis of imaginative and shifting *post hoc* rationalizations which may or may not have something to do with the basis on which the Secretary actually made his decision. Even if these rules are accepted we have argued that petitioner must still prevail, since not even the most clever reasoning can provide a legitimate park purpose for the access highway. But if we are wrong about that—if this Court concludes that construction of the highway somehow could be justified for the reasons now suggested by the government—at most the cause should be remanded to determine if those are the reasons that actually prompted the Secretary's decision.

THE PARK PURPOSE ISSUE

The government makes no serious effort to justify the access highway to the planned Mineral King development on grounds that it would serve the purposes for which the national parks, including Sequoia, are required by 16 U.S.C. § 1 to be managed. Indeed the only argument whatever to this effect is relegated to a footnote,[1] in which it is represented that the highway would

> ". . . enhance the public's opportunity to enjoy the Park, through improved access to it; it would also include construction of scenic overlooks and roadside parking areas, and involves interchanges and connections with other Park roads (Appendix A, *infra*, Clauses 20, 35)." (Appendix A is the proposed special use permit.)

We have already demonstrated in our opening brief (pp. 61-67) that the Secretary, if he thought at all about enhancing public opportunity to enjoy Sequoia National Park—a thought which he kept to himself so far as the inadequate administrative record in this case discloses—might well have concluded that construction of a high-speed road would be inadvisable and destructive. We will not repeat here our contentions in this regard. However, it seems to us that the government's specific reliance on Clauses 20 and 35 of the special use permit—a document that as we will show in a moment is not entitled to weight in any respect—does require comment.

Clause 20 is cited as authority for the statement that the highway would feature scenic overlooks and roadside parking areas. What Clause 20 provides in fact is that such facilities "shall be located and constructed as mutually agreed by the State and the Service." Obviously this language gives no assurance of actual construction. Clause 35 is cited for the statement that the highway will feature "interchanges and

---

[1] Respondent's brief n. 27, at 55-56.

connections with other Park roads." What Clause 35 provides in fact is that:

> "The State shall provide suitable access and connections to existing roads within the Sequoia National Park only at locations mutually agreed upon."

Again, on its face this language hardly carries any guarantee of construction. But what makes the government's reliance on Clause 35 even sillier—absurd would be an appropriate word under the circumstances—is that there are no "other Park roads" to connect or interchange with. At least, with the exception of the existing Mineral King Road to which there is already access from beyond both the west and east park boundaries, the government has not identified and we are not aware of any such "other Park roads."[2]

Given its need to rely on Clauses 20 and 35 of the special use permit, it is not surprising that the government has buried in a footnote its argument that:

> "To a significant extent, the new road would directly serve the needs of the Park itself." (Resp. Br. n. 27, at 55-56.)

At center, what the government does argue in the text of its brief is that, while Sequoia National Park as its boundaries are actually constituted would not be served by the access highway, that park must realistically be viewed as encompassing the Mineral King Valley, with which it allegedly is associated by its topography and by its history, and that viewed in this larger perspective the proposed resort development is simply an improvement of the park and the access highway simply a means of servicing park facilities. In this "non-technical sense," so the government urges, "it is clear that this road serves *only* a Park purpose." (Resp. Br. 56, emphasis as in original). The twin premises on which this argument rests are: first, that the Mineral King Valley lands "were intended by Congress to be integral with the [Sequoia National] Park" (Resp. Br. 56) and that because of this

---

[2]See map of area (A. 73).

"essential identity" (Resp. Br. 13) the "Park and Valley were intended by Congress to be administered and devleoped as a closely inter-related unit" (Resp. Br. 15); and second, that ski resorts and the attendent buildings, tows, lifts, and runs are authorized, without acreage limitations (Resp. Br. 54), within the national parks, so that the proposed development may permissibly be constructed and serviced by the access highway if the Valley is considered a part of the park.[3] This

[3]The government also invokes an asserted statutory duty of the Secretary of Interior to cooperate with the Secretary of Agriculture in the management of contiguous lands:

> "The Secretary's proposed authorization of the new road comports fully with his broad responsibilities and with the particular history and development of this area. Of course, the Secretary's primary duties relate to the national parks and other areas under his direct supervision. But Congress, in delegating responsibility over various portions of the public domain to different federal officials, was not unmindful that coordination between these officials is essential. Accordingly, it is expressly provided that the Secretaries of Agriculture and Interior are to cooperate in the supervision, management and control of contiguous lands under their respective control." (Resp. Br. 57)

The citation for this statement, with its reference to express provisions, is: "See 39 Stat. 535, as amended, 16 U. S. C. 2; compare 46 Stat. 1054, 16 U. S. C. 8c." We have seen the first of these provisions and compared it with the second, but we are completely in the dark about the relevance of either. 16 U. S. C. § 2 provides that "the Secretary of Agriculture may cooperate with said National Park Service to such extent as may be requested by the Secretary of Interior" in the supervision of national monuments contiguous to national forests. 16 U. S. C. § 8c provides that the Secretary of Interior shall secure the approval of the Secretary of Agriculture before approach roads to national parks are constructed through national forest lands. Both provisions deal with special situations and are wholly inapplicable to the present case. But even if they did establish some broad statutory requirement of cooperation between the two Secretaries as regards the administration of contiguous park and forest lands, there is absolutely no reason to believe that such a requirement would modify the obligation of the Secretary of Interior to manage the national parks for the fundamental purposes stated in 16 U. S. C. § 1, or that it would justify the surrender of park values to facilitate commercial development on adjoining lands. Moreover, because the record is completely silent as to

theory, the latest in a series of *post hoc* rationalizations of the Secretary's action, is a new arrival in this litigation.[4] Like its predecessors, it is untenable.

In the first place, even if there were validity in the notion that areas beyond park boundaries but forming part of what in the government's view is an "integral land mass" (Resp. Br. 13) may be treated for administrative purposes as incorporated in the park itself—a doctrine that would permit a dramatic expansion of lands under the effective control of the National Park Service—it would have no application so far as Sequoia National Park and the adjoining Mineral King Valley are concerned. That is true because, as the government itself recognizes (Resp. Br. 52), the Congress considered and rejected inclusion of the Valley in the park when it enacted the 1926 legislation enlarging the park. 44 Stat. 818, 16 U. S. C. § 45a. Instead, Congress designated the Valley as part of the Sequoia National Game Preserve within

---

what considerations the Secretary of Interior took account of when he approved the Mineral King access highway, we do not know whether he relied on some general mandate to cooperate with the Secretary of Agriculture—a mandate which in any event the government is unable to find even with full opportunity for *post hoc* rationalization of the Secretary's decision—or if so what authority he thought he had under any such mandate

[4] At another point in its brief, the government argues that:

> "Moreover, the use restrictions applicable to forest lands because of their designation as game refuges are no greater than those applicable to national park lands generally, and to Sequoia National Park lands in particular. [Citations omitted.] It follows that any use that would be proper on park lands would be proper in the Valley." (Resp. Br. 53-54.)

It is doubtless true that land uses that would be proper in national parks would often be proper on other adjoining public, or even private lands. But that circumstance is irrelevant unless it somehow supports a conclusion, which not even the government reaches, that connecting highways may be authorized within the parks whenever the adjoining lands to be served are devoted to uses consistent with park uses. However that may be, it makes no difference since as we demonstrate above the proposed development in the Valley would not be an authorized land use in Sequoia National Park.

Sequoia National Forest, 44 Stat. 821, 16 U. S. C. § 688, and expressly provided in this statute that while its status as a game refuge would prevent the hunting or trapping of wildlife, the Valley would otherwise remain subject to all uses permissible in national forest lands:

> ". . . the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established."

So the simple answer to the government's attempted merger of the Mineral King Valley into Sequoia National Park is that the areas are separate in fact, as evidenced by the boundary line between them, and that Congress expressly intended them to be distinctive as to both use and administration.

Even if the government's arguments could make the boundary line between the park and the Valley disappear, thus magically enabling the proposed development to be viewed as a park facility, it would make no difference since, contrary to the government's assertion (Resp. Br. 15, 54), the development would be an unauthorized land use within the park. That is so because of the limitations placed on the Secretary's authority by 16 U.S.C. § 45b, which relates specifically to Sequoia National Park and thus displaces any inconsistent provisions relating generally to the areas within the national park system:[5]

---

[5] Areas within the national park system are governed by the statutory provisions that are specifically applicable to those areas, except that the statutory provisions of general application, such as 16 U. S. C. §§ 1-4, also apply to the extent they are not inconsistent with any specific provisions. 16 U. S. C. § 1c(b). It is very far from being clear that a proposal to locate the Disney project within Sequoia National Park would be admissible under the statutory provisions applicable to the parks generally, even assuming that such a proposal were not barred by 16 U. S. C. § 45b. The general provisions to which the government points are 16 U. S. C. §§ 20 and 20a, pursuant to which it is represented

"Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent

---

that ski resort areas have been developed by private concessionaires in several different national parks (Resp. Br. 54). Section 20 provides in relevant part, referring back to the Act of August 25, 1916, the Organic Act of the National Park Service, 39 Stat. 535, that:

> "In furtherance of the Act of August 25, 1916 (39 Stat. 535), as amended, which directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas." (16 U. S. C. § 20.)

The government apparently reads this statement of policy, and the related directive in Section 20a, as a broad new grant of authority that enabled the Service to throw open the national parks to theretofore unauthorized land uses. In reality, however, Congress intended nothing of the sort, its central purpose in enacting the 1965 legislation of which both these provisions were a part, P.L. 89-249, being to give park concessionaires greater assurance and protection, in the form of possessory interests in improvements and guaranteed compensation in the case of loss of investment, see 16 U.S.C. §§ 20b-20e, in already existing land uses. See S. Rep. No. 765, 89th Cong., 1st Sess. (1965). If anything, the quoted language, since it speaks in terms of "controlled safeguards" for such facilities as "have to be provided," cut back on the Secretary's then existing authority with respect to park development, as set forth in the 1916 Organic Act, 39 Stat. 535, 16 U. S. C. § 3:

> "He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors . . . but for periods not exceeding thirty years."

Unless a ski resort and its attendant facilities can be regarded as a "use of land for the accommodation of visitors"—a usage which has never

> at any one place to any one person or persons or company for not to exceed twenty years, when such ground is necessary for the erection of buildings for the accommodation of visitors."

Since much more than ten acres is to be devoted to the "erection of buildings for the accommodation of visitors" (see Resp. Br. 38-39), and since the permit for such facilities is to be issued for a term of 30 years, it is manifest that the location of the proposed Disney development inside the boundaries of Sequoia National Park would be unauthorized.

THE SPECIAL USE PERMIT

The government lays great stress in its brief on the special use permit that the Service proposes to issue to the State of California for construction and maintenance of the park segment of the access highway to Mineral King. See Resp. Br. 5-6, 15, 55-56, 58-59. Evidently one conclusion the Court is meant to draw from the permit is that, following the approval of a park routing, some account was taken of park values in the design and planning of the highway. If that were the government's only point, we would feel no need to respond since, as we have shown in our principal brief, unauthorized administrative action cannot be justified by efforts to minimize its impact. However, the government now seems to be making an additional point about the per-

---

received judicial sanction and which so far as we can determine did not receive legislative consideration, let alone sanction, in connection with P.L. 89-249—the Secretary's authority to permit such developments within the national parks is questionable at best. And see also in this connection *Administrative Policies For Natural Areas Of The National Park System*, Department of Interior, National Park Service, pp. 8, 48 (1970 ed.), in which skiing is not listed among those recreational activities that "can be accommodated without material alteration or disturbance of environmental characteristics or the introduction of undue artificiality into a natural environment," which according to this publication are the only kinds of recreational activities to be encouraged in the natural areas of the national park system, including the national parks themselves.

mit, to which we do feel a need to respond—namely, that the provisions of the permit reflect the considerations that the Secretary deemed relevant and took into account at the time he made his decision to approve the highway. Thus the government argues:

> "Finally, the proposed new road would not pose any real dangers to the park lands. . . . At each step, extraordinary safeguards to provide against destruction of Park values have been, or would be, taken. Professor Hartesveldt's ecological study reported that construction of the proposed road would not damage the Park's sequoias, provided stated precautions were taken; only after receiving this assurance did the Secretary agree to authorize California to build the new road, specifically subject to the Hartesveldt recommendations (Appendix A, *infra*, Clause 26). More generally, the permit requires that '[d]esign and construction must afford . . . protection' for environmental features (Clause 16). And all federal and state standards for controlling and eliminating air and water pollution must be met (Clause 34). The state has agreed that if the new road is not adequate to handle the increased traffic, it will not seek any further improvement of the road through the Park, but instead will provide for such traffic by other means (Clause 37). All phases of the design and construction of the road are subject to departmental supervision and control (Clauses 1, 6, 9, 10, 12, 16, 20, 21, 22, 23, 25, 26, 28, 29, 35). In these circumstances, construction of the new road would pose no significant risk of harm to the Park or park values." (Resp. Br. 58-59)

This argument carries a strong suggestion that the provisions of the permit, as they appear in Appendix A to the government's brief, were already settled and were at least part of the record on the basis of which the Secretary authorized the highway corridor through Sequoia National Park. In fact it is not at all clear that any form of proposed permit was in being when the Secretary acted. See Affidavit of Sequoia National Park Superintendent McLaughlin paras. 4,

6; A. 181-182. Certainly no such document was placed before the District Court. But even if some proposed permit was then in being, it was not in the same form as Appendix A to the government's brief. For that matter, Appendix A is not the same as the proposed permit that the government attached as an appendix to its reply brief in the Ninth Circuit.[6] So, for example, Clause 37 of the permit appearing as Appendix A, on which the government relies in the argument quoted above and in which conditions against further expansion of the access highway are set forth, was not included in the permit presented to the Ninth Circuit.[7]

We are not certain what conclusion to draw from the changing character of the special use permit for the access highway, but quite obviously the document before this Court as Appendix A to the government's brief was not before the Secretary when he made his decision. Even if it had been, as we have seen, it would make no difference since even in its present form the proposed permit does not establish a park purpose for the highway.

---

[6]The document attached to the government's reply brief in the Ninth Circuit was the first form of proposed permit to appear in this litigation. That is the document to which we addressed our remarks in our opening brief in this Court (p. 75, n. 73).

[7]We are not entirely certain what other differences there may be in the two forms of permit, because the government omitted a page (apparently containing Clauses 1-14 of the permit as it then stood) from the document that it attached as an appendix to its reply brief in the Ninth Circuit. However, there must have been at least some other changes. Compare, for example, Clause 15 of Appendix A (which deals with revocation of the permit) with Clause 15 of the document appended to the reply brief in the Ninth Circuit (which deals with matters unrelated to revocation, the latter being a subject not touched on anywhere in this document unless by some provision on the omitted page). And compare also the first page of the two forms of permit, the term of the permit being left blank in Appendix A while the dates were inserted in the document appended to the reply brief in the Ninth Circuit (suggesting, so we argued in our opening brief in this Court—p. 75, n. 73—an unwarranted reliance on 16 U.S.C. §45b).

CONCLUSION

For the foregoing reasons, and for the reasons already set forth in our principal brief, the order of the Court of Appeals vacating the preliminary injunction should be reversed.

Respectfully submitted,

MARK L. EVANS
ANTHONY A. LAPHAM
DONALD S. BURRIS
PHILIP J. HARTER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

EDWARD LEE ROGERS
162 Old Town Road
East Setauket, N.Y. 11733

Attorneys for Amicus Curiae Environmental Defense Fund

SHEA & GARDNER

Of Counsel